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In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Webster J. Arceneaux, III
(WV State Bar I.D. No. 155)
LEWIS, GLASSER, CASEY & ROLLINS, LLP
Suite 700, One Valley Square
Charleston, WV 25301
(304) 345-2000

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTION PRESENTED

Buckhannon Board and Care Home, Inc., the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents filed a civil action challenging the self-preservation regulations of the Respondents under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601, *et seq.* and Titles II and III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12132 and 12182. The civil action was mooted when the West Virginia Legislature repealed the self-preservation regulations. The Petitioners requested their attorney's fees under the "catalyst theory" and they were denied because of the United States Court of Appeals for the Fourth Circuit's *en banc* decision in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.)(en banc), *cert.denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). The question presented is:

Whether the Fourth Circuit erred in its interpretation of *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), in *S-1 and S-2*, in concluding that the "catalyst theory" is no longer available for civil rights plaintiffs to recover attorney's fees, when ten of the other Courts of Appeals continue to apply the "catalyst theory" in these types of cases.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the Court of Appeals: Joan E. Ohl, Secretary, West Virginia Department of Health and Human Resources; Office of Health Facility Licensure and Certification; John Wilkenson, Director, Office of Health Facility Licensure and Certification; Sandra L. Daubman, Program Manager, Office of Health Facility Licensure and Certification; West Virginia Office of the State Fire Marshal, Walter Smittle, Fire Marshal; Cecil Underwood, in his official capacity as Governor of the State of West Virginia; State of West Virginia; West Virginia State Fire Commission; John Beaty, II, Commissioner; Joseph J. Bostar, III, Commissioner; Randy Breeden, Commissioner; James W. Fife, Commissioner; Francis A. Guffey, II, Commissioner; Daniel Hess, Commissioner; Gregory Alan Lay, Commissioner; David L. Tolliver, Commissioner; Stephen C. Mcbee, Commissioner; Bill L. Spencer, Commissioner; Victor Stallard, Jr., Commissioner; J. D. Waggoner, Commissioner; and, Kenneth Morgan, Commissioner. There are no additional parent or subsidiary companies of the parties listed in the foregoing list.

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PETITION FOR A WRIT OF CERTIORARI

Buckhannon Board and Care Home, Inc., the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents respectfully petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 20, 2000, in order to resolve a conflict between the Fourth Circuit, which does not accept the "catalyst theory," and ten remaining Circuits: First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh, that all continue to allow a party to recover attorney's fees under the "catalyst theory." The Fourth Circuit's decision in this matter further conflicts with this Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000), which implies that the "catalyst theory" remains a viable mechanism to collect attorney's fees in appropriate cases. This Court is now squarely presented with a holding by the Fourth Circuit that attorney's fees are not available under the "catalyst theory" and it should reverse the Fourth Circuit's decision in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is dated January 20, 2000, and it is unpublished (App. A4). The opinion of Chief Judge Frederick P. Stamp, Jr., United States District Court for the Northern District of West Virginia is dated January 29, 1999 and it is also unreported (App. A9).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 20, 2000. A Petition for Rehearing and Petition for Rehearing *En Banc* was denied on February 15, 2000. (App. A1). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This civil action was filed under the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. §§ 3601, *et seq.* and Titles II and III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12132 and 12182. The FHAA provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2) (App. A21). The ADA, 42 U.S.C. § 12205, similarly provides that a "court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." (App. A24).

STATEMENT OF THE CASE

Buckhannon Board and Care Home, Inc. ("BBCH"), the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents filed a civil action on October 28, 1996, against the West Virginia Department of Health and Human Resources, the Office of Health Facility Licensure and Certification ("OHFLAC"), the State Fire Marshal and the State Fire Commission to challenge Cease and Desist Orders that were issued under regulations that required all persons residing in a Residential Board and Care Home ("RBCH") to be capable of "self-preservation," i.e. to have the ability, without prompting, to evacuate in the event of an imminent danger such as a fire. The Petitioners' Amended Complaint primarily sought to challenge the Cease and Desist Orders and the self-preservation regulations of the State Fire Code and legislation pertaining to OHFLAC, W. Va. Code §§ 16-5C-2(f), 16-5H-2(f) (now 16-5H-2(j)); C.S.R. 64-65-3, 3.14 (now C.S.R. 64-65-3, 3.36); and, 87-1-14, 14.7, on the basis that they were contrary to the intent and purpose of the FHAA and Titles II and III of the ADA.

In 1996, when the administrative record was made, Dorsey Pierce was an alert woman of 102 years and a four year resident of BBCH in Buckhannon, West Virginia. (Stipulation Exhibit 1, 11/15/96 Tr. at p. 69). Pursuant to the regulations, Ms. Pierce was not eligible to continue residing at BBCH because she was not capable of self-preservation. The Respondents issued Cease and Desist Orders which would

require BBCH to shut down and thereby cause Dorsey Pierce and others to move. (*Id.*, Department Exhibits 1 and 2). BBCH had operated three homes in Buckhannon, West Virginia since 1988. (*Id.* at pp. 100, 109). It was the goal of BBCH to provide the residents with a home-like environment that would be more comfortable than living in an institutional setting. (*Id.* at 113). The residents at BBCH did not need any special care such as nursing care, and they were all private pay residents, i.e., no one paid through Medicaid or SSI (*Id.* at p. 111). It is undisputed that BBCH was in compliance with the legal requirements of OHFLAC and the State Fire Code, except for non-compliance with the self-preservation provisions at issue in this case. (*Id.* at 53, 115-16).

The Petitioners suit was filed challenging the Cease and Desist Orders and a Temporary Restraining Order hearing was immediately scheduled before Chief Judge Frederick P. Stamp, Jr. for November 1, 1996. Upon discussion of the matter at the TRO hearing, the parties stipulated to the entry of an Agreed Order that was entered on November 4, 1996, staying the enforcement of the Cease and Desist Orders pending further factual development and briefing of the legal issues.

The issue before the District Court pitted the concept of "aging in place" in a home-like residential setting such as an RBCH, against the fire safety concerns of the State related to non-institutional settings. This was not an issue unique to West Virginia, as it had developed on a national level when the National Fire Protection Association (NFPA) developed its Life

Safety Code in 1985, inserting Chapter 21 to address the fire safety needs of RBCHs. (Stipulation Exhibit 2, Ex. 2). The Petitioners retained the services of several national experts in the area of fire safety at RBCHs, including Dr. Bernard Levin, a former government employee of the National Bureau of Standards who used his background in fire safety and psychology to help develop the first flexible fire safety standards for RBCHs. Dr. Levin testified with regard to the history of self-preservation regulations across the country.

He testified that when he began his work twenty years earlier, all states had self-preservation requirements for RBCHs. (Stipulation Exhibit 6, Levin depo. at p. 62). It was his goal in developing the chapters in the NFPA Life Safety Code on RBCHs to avoid any reference to the concept of self-preservation because:

> We were trying to avoid requiring people to be in an institutional-like setting with its costs and other deficits just because somebody could not be certified as capable as self-preservation, a term which had no definition. (*Id.*).

He further testified that it was his goal, which was latter accepted in the NFPA Life Safety Code in 1985, to adopt a flexible approach to fire safety, that looked to several factors at the RBCH, not just the ability of a resident to evacuate the premises. As Dr. Levin testified, to adopt an equivalent approach to fire safety, that would run across the full spectrum of RBCHs, he focused on an evaluation of the facilities'

capability to evacuate. (*Id.* at 41). The specific idea that he came upon was to categorize all facilities into three categories for evacuation capability as **prompt, slow, and impractical**. Once a facility and its residents were evaluated under these three approaches, the fire safety parameters for that facility could be devised on an individualized basis. Dr. Levin went on to testify, that after he left the government, he performed a survey for the National Institute of Standards and Technology, and that he had determined that a majority of states had now abandoned the concept of self-preservation for RBCHs and adopted the flexible approach he created in the NFPA Life Safety Code. (*Id.* at 64).

State Fire Marshal Smittle testified in his March 11, 1997, deposition that he had been philosophically opposed to the adoption in 1985 of Chapter 21 of the NFPA Life Safety Code, pertaining to RBCHs, and that he had voted against those provisions at the time (Stipulation Exhibit 5, Smittle depo. at pp.23-28). He thought the regulations pertaining to self-preservation were essential in a small rural state like West Virginia (*Id.*). Two assumptions were built into State Fire Marshal Smittle's position on this issue: first, he put his confidence in buildings being made safe rather than relying on people to help evacuate others; and, second, that a resident at an RBCH not capable of self-preservation will be moved to a higher level of care such as an institutional nursing home which will provide a safer environment. (*Id.* at p. 23)

Because of his beliefs, State Fire Marshal Smittle was in a position to dictate that the State of West Virginia would adopt all of the NFPA Life Safety Code provisions, with the exception of the provisions related to RBCHs for a period of eleven years prior to this civil action being filed. This was despite the fact that the NFPA and a majority of States had already abandoned the self-preservation approach for a more individualized approach to fire safety at RBCHs. Somewhat surprisingly, a mere six weeks after his deposition and the depositions of several of the Petitioners' fire safety experts, State Fire Marshal Smittle made a complete reversal from his long held opposition to the provisions in the NFPA Life Safety Code related to RBCHs. He began taking steps to repeal the self-preservation regulations without advising his counsel in this matter, the Petitioners or the Court.

Between State Fire Marshal Smittle's deposition in March, 1997 and January, 1998, the parties completed their discovery and submitted a voluminous stipulated record to the District Court along with their cross-motions for summary judgment. The District Court entered an additional ruling in this matter on February 19, 1998, denying the Respondents' Motion to Dismiss this civil action.

Sometime on or about February 24, 1998, it came to the attention of undersigned counsel that the Respondents had taken steps to repeal the self-preservation regulations. Counsel for the Petitioners advised counsel for the Respondents of this development, of which he was unaware, and this led to Motions

for a Stay and Motions to Dismiss as Moot being filed in March, 1998 and thereafter.

On March 14, 1998, the West Virginia Legislature enacted House Bill 4200, related to amendments to the State Fire Code, §§ 87-1-1,. *et seq*. and Senate Bill 627, related to W.Va. Code §§ 16-5H-1 *et seq*. that resulted in a repeal of the self-preservation provisions challenged in this civil action. On January 29, 1999, Chief Judge Frederick P. Stamp, Jr., with the United States District Court for the Northern District of West Virginia, entered a final order denying the Petitioners' Renewed Motion for Summary Judgment and Motion for Attorney's Fees and granted the Respondents' Motions to Dismiss the case as Moot (App. A9).

The Petitioners' Motion for Attorney's Fees was premised upon the "catalyst theory" and the "bad faith" exception to the American Rule on attorney's fees. The Petitioners stated that they were entitled to their attorney's fees under the "catalyst theory," because the Petitioners' lawsuit challenging the Respondents' policies regarding self-preservation led to the Respondents abolishing these requirements. Thus, the Petitioners obtained the relief that they sought in the first instance: BBCH was allowed to remain open and Dorsey Pierce and others were not required to move out of BBCH. The Petitioners further argued that, based upon the chronology of events in this case, there could be no doubt that the Petitioners caused the Respondents to change their position on self-preservation.

Petitioners specifically pointed to the fact that Respondent State Fire Marshal Smittle had long been philosophically opposed to the provisions in the NFPA Life Safety Code related to RBCHs. The Respondents had therefore vigorously fought the litigation every step of the way, and had never given any prior indication that they were willing to settle or withdraw from their position that the self-preservation regulations were necessary to the State. Finally, the Petitioners argued that they had a bona fide claim for relief in their civil action, that raised significant legal issues from a national perspective under the NFPA Life Safety Code which were actionable under the ADA and the FHAA.

In his Order, (App. A9), Chief Judge Stamp denied the Petitioners' Motion for Attorney's Fees under the "catalyst theory," because of the Fourth Circuit's decision in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). He did state however, "[w]ere this argument viable, plaintiffs might prevail on this theory." (App. A17). Chief Judge Stamp also concluded that, while the Petitioners had made a "very strong argument," the conduct of the State Fire Marshall did not "quite rise, or sink" to the level of bad faith to warrant an award under the attorney's fees "bad faith" exception. (App. A19). The District Court further ordered the parties *sua sponte*, to brief the issue of sanctions under Rule 11, Federal Rules of Civil Procedure, as a result of the alleged bad faith conduct of the State Fire Marshall's Office. (App. A19) By Order entered April 22, 1999, Rule 11 sanctions were

imposed upon the State Fire Marshall's office in the amount of $3,252.00. In so holding, the District Court stated:

> This Court finds that as a state agency and an officer of a state agency, defendants should have been aware of the nature of this litigation. Further, because the "self-preservation" requirement was the root of this case, that defendants could not have known that its deletion would affect this litigation is doubtful, at best.

April 22, 1999 Order, at p.6.

An appeal to the United States Court of Appeals for the Fourth Circuit was filed challenging only one portion of Chief Judge Stamp's Order of January 29, 1999, *to wit* his decision that an attorney's fees award to the Petitioners could not be made under the "catalyst theory" based upon the Fourth Circuit's *en banc* decision in *S-1 and S-2*. The three-judge panel of the Fourth Circuit in this case likewise held that it was obligated under circuit precedent to follow the Fourth Circuit's *en banc* decision in *S-1 and S-2* in its *per curiam* opinion of January 20, 2000, denying the Petitioners any relief (App. A4).

A timely Petition for Rehearing and Petition for Rehearing *En Banc* was also denied (App. A1). This Court should now consider the merits of the Petitioners' claim for attorney's fees under the "catalyst theory" in light of the

conflict between the Fourth Circuit, which does not accept the "catalyst theory," and the remaining ten Circuits: First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh, that all continue to allow a party to recover attorney's fees under the "catalyst theory." The Fourth Circuit's decision in this matter further conflicts with this Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000), which implies that the "catalyst theory" remains a viable mechanism to collect attorney's fees in appropriate cases. This Court is now presented with the perfect opportunity to reverse the Fourth Circuit's opinion that attorney's fees are not available under the "catalyst theory."

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fourth Circuit decided in its *en banc* decision in *S-1 and S-2* that this Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121, L.Ed.2d 494 (1992) required it to conclude that the "catalyst theory" was no longer available to civil rights litigants to recover attorney's fees. This Court recently addressed that conclusion in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000), wherein this Court reviewed *S-1 and S-2* but held that it was premature to consider reversing that holding in the context of that case. However, this Court did state:

> *Farrar* acknowledged that a civil rights plaintiff awarded nominal damages may be a "prevailing party" under 42 U.S.C. § 1988, 506 U.S., at 112. *The case involved no catalytic effect.* Recognizing that the issue was not presented for this Court's decision in *Farrar*, several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory. See *Marbley v. Bane*, 57 F. 3d 224, 234 (CA2 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F. 3d 541, 546-550 (CA3 1994); *Zinn v. Shalala*, 35 F. 3d 273, 276 (CA7 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist., #1*, 17 F.3d 260, 263, n.2 (CA8 1994); *Kilgour v. Pasadena*, 53 F. 3d 1007, 1010 (CA9 1995); *Beard v. Teska*, 31 F. 3d 942, 951-952 (CA10 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (CA11 1999). Other Courts of Appeals have likewise continued to apply the catalyst theory notwithstanding *Farrar*. *Paris v. United States Dept. of Housing and Urban Development*, 988 F. 2d 236, 238 (CA1 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F. 2d 255, 257 (CA6 1993). (emphasis added).

120 S.Ct. at 711.

The above quoted passage, clearly illustrates that the Fourth Circuit in *S-1 and S-2* incorrectly interpreted this Court's prior decision in *Farrar* and its impact on the "catalyst theory." It further shows that the decision in *S-1 and S-2* is in direct conflict with the decisions of ten other Court of Appeals, which have all independently concluded that the "catalyst theory" remains a viable mechanism for civil rights litigants to recover their attorney's fees. Unlike the decision in *Friends of the Earth, Inc., supra,* where the district court had not ruled upon a motion for attorney's fees, here the issue was presented to the District Court and denied in the first instance based upon the Fourth Circuit's decision in *S-1 and S-2*. This case then presents this Court with the perfect opportunity to review the Fourth Circuit's decision in *S-1 and S-2* and to hold that the "catalyst theory" remains viable for civil rights litigants to recover their attorney's fees in appropriate cases.

A. An overview of this Court's decisions on the "catalyst theory."

This Court discussed the "catalyst theory" in *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987):

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through judgment, *e.g.*, a monetary

> settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Id., 107 S.Ct. at 2676.

Thus, under the "catalyst theory," a plaintiff must obtain some form of the remedies he or she sought when filing the complaint. Additionally, in order to receive attorney's fees under the "catalyst theory," the plaintiff must establish that his or her lawsuit motivated the conduct of the defendant which mooted the plaintiff's claim for relief. *Id.*, 107 S.Ct. at 2677; *see also Marbley v. Bane*, 57 F.3d 224, 234 (2nd. Cir. 1995).

Following this Court's decision in *Hewitt*, this Court issued its decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), holding that a plaintiff who is awarded only nominal damages in a civil rights lawsuit may be a prevailing party. Despite this holding, this Court further affirmed the decision of the Court of Appeals that held that the plaintiffs were not entitled to an award of attorney's fees under the facts of the case. In defining who is a prevailing party, this Court stated:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The Plaintiff must obtain an enforceable judgment against the

> defendant from whom fees are sought, *Hewitt, supra*, 482 U.S., at 760, 107 S.Ct. at 2675, or comparable relief through a consent decree or settlement, *Maher v. Gayne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980).

Id. 113 S.Ct. at 573.

More recently, this Court had the opportunity in *Friends of the Earth, Inc., supra*, to examine the "catalyst theory" under *Farrar* and the Fourth Circuit's decision in *S-1 and S-2*. Even though this Court did not issue a precedential ruling on the issue of attorney's fees, this Court apparently rejected the Fourth Circuit's conclusion in *S-1 and S-2* that *Farrar* was intended to eliminate the "catalyst theory." Specifically, this Court stated that the *Farrar* case "involved no catalytic effect." 120 S.Ct. at 711. This Court ultimately decided that it was premature for it to decide the issue of attorney's fees under the "catalyst theory" because it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." *Id.* at 712. The fact that this Court chose to remand the matter in *Friends of the Earth, Inc., supra* to the District Court further suggests that this Court has implicitly, if not explicitly rejected the Fourth Circuit's decision in *S-1 and S-2*.

B. The Fourth Circuit's *en banc* decision on the "catalyst theory."

In *S-1 and S-2 v. State Board of Education*, 6 F.3d 160 (4th Cir. 1993), the Fourth Circuit was confronted with an argument for attorney's fees under the "catalyst theory" immediately after this Court decided *Farrar*. The majority concluded that this Court's decision in *Farrar* had not intended to reverse the long standing and important "catalyst theory" without addressing it "head-on." *Id.* at 166. Fourth Circuit Chief Judge Wilkinson dissented from the majority's opinion, as he stated:

> The language of *Farrar* is plain: "[T]o qualify as a prevailing party . . . [t]he plaintiff must obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement." *Id.* at ___, 113 S.Ct. at 573. "Whatever relief the plaintiff secures must directly benefit him at the time of *the judgment or by the settlement*." *Id.* [emphasis added by dissenting judge]. "*Only* under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party." *Id.* [emphasis added by dissenting judge]. "No material alteration of the legal relationship between the parties occurs *until* the plaintiff becomes

> entitled to enforce a judgment, consent decree or settlement against the defendant." *Id.* [emphasis added by dissenting judge].
>
> * * *
>
> There is no way, however, that *Farrar* and a broad "catalyst theory" of attorneys' fees recovery can be reconciled.

Id. 6 F.3d at 168-169.

In his dissenting opinion, Chief Judge Wilkinson criticized the decisions of three other Courts of Appeals that he felt did not properly consider *Farrar*[1] and he added three additional policy reasons why no Court should continue to recognize the "catalyst theory," including:

1) The "catalyst theory" of attorney's fees recovery conflicts with the plain language of § 1988 itself, as only a prevailing party may recover fees, not someone who influences a change in behavior or policy.

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[1] At footnote two of his dissent, Chief Judge Wilkinson went on to find fault with the three Courts of Appeals that continued to recognize the "catalyst theory" after the Supreme Court's decision in *Farrar*. *See e.g. Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255 (6th Cir. 1993); and, *Craig v. Gregg County*, 988 F.2d 18 (5th Cir. 1993).

2) The "catalyst theory" engenders confusion and unnecessary litigation because no standard precisely sets forth where a court is to look to determine how a lawsuit and an outcome are connected. *Farrar*'s limitation to three specific outcomes is a more precise rule.

3) The "catalyst theory" results in officials being unwilling to take voluntary action and may provide incentives for frivolous litigation.

Chief Judge Wilkinson's dissent was ultimately upheld as a Petition for Rehearing was filed in *S-1 and S-2*, and the Fourth Circuit issued a *per curiam en banc* decision adopting his dissenting opinion as the majority opinion. *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994).

C. Ten of the other Courts of Appeals hold that the "catalyst theory" is still available in civil rights cases.

The other Courts of Appeals that have addressed this issue are uniform in their conclusion that civil rights litigants may recover their attorney's fees under the "catalyst theory." *See e.g., State of New Hampshire v. Adams*, 159 F.3d 680, 685

(1st Cir. 1998); *Marbley v. Bane, supra*;[2] *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 545-550 (3d Cir. 1991); *Craig v. Gregg County*, 988 F.2d 18, 21 (5th Cir. 1993); *Payne v. Board of Education, Cleveland City Schools*, 88 F.3d

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[2] The Second Circuit's decision in *Marbley v. Bane, supra*, is often cited by other Courts of Appeals that have considered the language of *Farrar* and whether it nullified the "catalyst theory." The Second Circuit in *Marbley*, at 234, concluded that nothing in *Farrar* invalidated the "catalyst theory" as follows:

> In *Farrar*, the Supreme Court said that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from who the fees are sought, or comparable relief through a consent decree or settlement. [*Farrar, supra,*] 113 S.Ct. at 573 (citations omitted). That language, however, appears in the segment of the opinion that discusses the particular award in that case: a jury verdict resulting in a final judgment of nominal damages. Earlier in the opinion, the Court noted its "'generous formulation'" under which "'Petitioners may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which obtains some of the benefit the parties sought in bringing suit.'" *Id.* at ___, 113 S.Ct. at 572 (citation omitted).

392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *Little Rock School District v. Special School District 1*, 17 F.3d 260, 262-263 (8th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *American Council of the Blind v. Romer*, 992 F.2d 249, 250-251 (10th Cir.), *cert. denied*, 510 U.S. 864, 114 S.Ct. 184 (1993); *Cullens v. Georgia. Department of Transportation*, 29 F.3d 1489, 1494-1495 (11th Cir. 1994).

Several Courts of Appeals have specifically rejected the Fourth Circuit's decision in *S-1 and S-2*, upon a finding that it had misread or misinterpreted this Court's holding in *Farrar*. *See e.g. Brown v. Local 58, International Brotherhood of Electrical Workers*, 76 F.3d 762, fn 7 (6th Cir. 1996) (Fourth Circuit's reading of *Farrar* has been rejected by other circuits that have considered the issue); *Kilgour, supra*, at 1010 (*Farrar* not applicable because it involved recovery on the merits and the "catalyst theory" is an alternative theory); *Cady v. City of Chicago*, 43 F.3d 326 (7th Cir. 1994) ("*Farrar* does not preclude the award of fees when plaintiffs attain the relief they seek through defendants' voluntary action"); *Zinn, supra*, at fn 4 (*Hewitt v. Helms* does allow the award of attorney's fees under the "catalyst theory" and *Farrar* does not provide otherwise); *Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994) (All the other circuits that have considered the issue continue to follow the "catalyst theory").

Petitioners highlight the recent decision of the Court of Appeals for the Eleventh Circuit in *Morris v. City of West Palm*

Beach, 194 F.3d 1203 (11th Cir. 1999), for its discussion regarding the continuing viability of the "catalyst theory" after *Farrar* wherein the Court of Appeals stated as follows:

> While no Supreme Court case has ever affirmatively upheld the application of the catalyst test, the catalyst test accords well with long-held notions of prevailing parties. *See Hewitt v. Helms*, 482 U.S. 755, 760- 61, 107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987) ("It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment-*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor."). Additionally, the question before the Court in *Farrar* addressed the *degree* of relief, rather than the *form* of relief, for the plaintiffs in *Farrar* had attained an enforceable judgment of nominal damages. 506 U.S. at 107, 113 S.Ct. at 570. The fact that the majority used broad language in discussing the question before it (i.e., whether an enforceable judgment of nominal damages can justify a fee award under

> § 1988) does not indicate how it would rule on the question of whether a showing that a plaintiff's lawsuit caused the defendant to act to remedy unconstitutional behavior can justify a fee award. *See Marbley*, 57 F.3d at 234; *Baumgartner*, 21 F.3d at 547-48.

194 F.3d at 1207.

This Court in *Friends of the Earth, Inc., supra*, cited to *Morris v. City of West Palm Beach, supra*, and a majority of the other Court of Appeals decisions in apparently concluding that nothing in *Farrar* repudiated the "catalyst theory." This Court is now squarely presented with a holding by the Fourth Circuit that attorney's fees are not available under the "catalyst theory" and it should reverse the Fourth Circuit's holding in this case.

D. The Petitioners are entitled to their attorney's fees under the "catalyst theory."

The Petitioners respectfully request this Court to review the Fourth Circuit's decision in *S-1 and S-2* in light of the decisions of ten other Courts of Appeals that have concluded that the "catalyst theory" remains viable for Plaintiffs to recover their attorney's fees in civil rights cases and this Court's recent decision in *Friends of the Earth, Inc., supra*. Unlike the procedural posture of the case in *Friends of the Earth, Inc., supra*, the attorney's fees issue is ripe for review in this case. The Petitioners moved for Attorney's fees under the "catalyst

theory" and the District Court specifically denied the fees because of the Fourth Circuit's decision in *S-1 and S-2* (App. A9). The District Court did state however, "[w]ere this argument viable, plaintiffs might prevail on this theory." (App. A17).

The Petitioners moved for attorney's fees under the FHAA, which provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2) (App. A21); and, the ADA, 42 U.S.C. § 12205, which similarly provides that a "court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." (App. A24). The Courts of Appeals have considered these provisions to be substantially similar to the attorney's fees provisions under Title VII, 42 U.S.C. §§ 2000e, *et seq.* and 42 U.S.C. § 1988. *See e.g. Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1232 (10thc Cir. 1997) (Application for attorney's fees arising under 42 U.S.C. § 12205 is treated the same as a claim arising under Title VII or section 1988); *Pottgen v. Missouri State High School Activities Association*, 103 F.3d 720, 723 (8th Cir. 1997) (Application for attorney's fees arising under 42 U.S.C. § 12205 is treated the same as a claim arising under 42 U.S.C. §1988); *Oxford House-A v. City of University City*, 87 F.3d 1022, 1024 (8th Cir. 1996) (Application for attorney's fees arising under 42 U.S.C. § 3613(c)(2) is treated the same as a claim arising under Title VII or section 1988; facts don't support "catalyst theory"); *Paris v. United States Dept. of*

Housing & Urban Development, 988 F.2d 236 (1st Cir. 1993) (Application for attorney's fees arising under 42 U.S.C. § 3613(c)(2) and 42 U.S.C. §1988 was appropriate under the "catalyst theory")

Based upon the existing case law developed under the "catalyst theory," the Petitioners contend that they are entitled to their attorney's fees under the tests commonly used by the Courts of Appeals to award attorney's fees in this context.[3] The first factor commonly considered by a court under the "catalyst theory" is whether there was a material alteration of the legal relationship between the parties. The Petitioners filed suit challenging the Respondents' policies regarding self-preservation as they sought a permanent injunction prohibiting the enforcement of these regulations. The parties initially entered into an Agreed Order staying any enforcement action by the Respondents. The District Court also concluded that the Respondents' Motions to Dismiss should be denied. At some point after the Petitioners presented their expert deposition testimony in this case, the Respondents capitulated on their long standing support of the self-preservation regulations.

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[3] *See e.g. Morris v. City of West Palm Beach, supra*, for an example of a three part test utilized by the Eleventh Circuit to award attorneys fees under the "catalyst theory." Most courts have employed a similar two or three part test to consider attorney's fees under the "catalyst theory."

The voluntary conduct of the Respondents resulted in amendments to their regulations and legislative provisions by abolishing the requirements of self-preservation. Thus, the relief obtained by the Petitioners was that which they sought in the first instance. Specifically, BBCH was allowed to remain open and Dorsey Pierce and others were not required to move out of BBCH, as first mandated by the Respondents in the Cease and Desist Orders.

A second factor often considered by a court reviewing an application for attorney's fees under the "catalyst theory" is whether there was a causal relationship between the civil action filed by the plaintiffs and the voluntary action of the defendants. When one looks to the surrounding circumstances and the chronology of events in this case there can be no doubt that the Petitioners caused the Respondents to change their position on self-preservation.[4] It is disingenuous at best, for the

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[4] The Plaintiffs filed their Complaint in this matter on October 28, 1996, and the Defendants contested the Plaintiffs allegations vigorously. On March 11, 1997, Plaintiffs took the depositions of State Fire Marshal Smittle and Deputy Fire Marshal Darl Cross and each of them asserted that they could not eliminate or modify the self-preservation regulation as it was necessary to protect residents of RBCHs, as well the staff and firefighters who serve such residents, from injury by fire. (Stipulation Exhibit 4, Cross Depo. at p. 14, 20-22); (Stipulation Exhibit 5, Smittle Depo. at p. 22-24). Significantly, a mere six weeks after those depositions, the State Fire Marshal's Office took steps to eliminate the self-preservation regulations.

Respondents to suggest that the changes to the State Fire Code, that led to the repeal of the self-preservation regulations, were unrelated to this civil action. State Fire Marshal Smittle had personally thwarted implementation of the RBCH provisions of the NFPA Life Safety Code for over eleven years.

Finally, courts have often looked to the underlying objective merits of the litigant's claims in considering the merits of a request for attorney's fees under the "catalyst theory." There can be no doubt in this case that the Petitioners had a colorable claim with an objective meritoriousness to that claim. The District Court denied the Respondents' Motion to Dismiss, and in the opinion of undersigned counsel, likely would have granted the Petitioners' Motion for Summary Judgment. From the Petitioners' perspective, this case addressed serious issues of life and death, as they developed expert testimony to establish that elderly residents of BBCH could develop transfer trauma and die if they were required to move out of their existing home-like environment and move into the more sterile environment of an institutional setting.

This Court, in its recent decision in *Friends of the Earth, Inc., supra*, states that it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees."120 S.Ct. at 712. The Petitioners presented their Motion for Attorney's Fees to the District Court based upon the facts set forth above and the Motion was denied because of the Fourth Circuit's decision in *S-1 and S-2*. The Petitioners then appealed to the Fourth

Circuit in an attempt to have it reconsider its *en banc* decision, but neither the three judge panel nor the Court as a whole were willing to reconsider their prior decision in *S-1 and S-2*. Therefore, this Court should reverse the decision of the Fourth Circuit and remand this case to Chief Judge Frederick P. Stamp, Jr. with the United States District Court for the Northern District of West Virginia with instructions to make appropriate findings of fact and conclusions of law with regard to the Petitioners' Motion for Attorney's Fees in this case.

CONCLUSION

This Court should grant *certiorari* to review the Fourth Circuit's decision in this matter and in *S-1 and S-2*. This Court should enter a ruling that an award of attorney's fees and costs may be made based upon the facts of this case under the "catalyst theory." This Court should further remand this case to Chief Judge Frederick P. Stamp, Jr. with the United States District Court for the Northern District of West Virginia with instructions that he consider the Petitioners' Motion for Attorney's Fees and for such further relief as this Court deems just.

Respectfully submitted,

Webster J. Arceneaux, III
(WV State Bar I.D. No. 155)
LEWIS, GLASSER, CASEY
& ROLLINS, LLP
Suite 700, One Valley Square
Charleston, West Virginia 25301
(304) 345-2000
Attorney for Petitioners

May 12, 2000

APPENDIX A

APPENDIX

Order on Petition for Rehearing and Rehearing *En Banc* A1

Buckhanon Board and Care, Inc. et al. v. West Virginia Department of Health and Human Resources, et al., *Per Curiam* Opinion, Unpublished No. 99-1424 ..... A4

Buckhanon Board and Care, Inc. et al. v. West Virginia Department of Health and Human Resources, et al., District Court Order, January 29, 1999, Unpublished, Civil Action No. 2:96CV106 ..... A9

Fair Housing Amendments Act of 1988 Provision *42 USC § 3613* A21

Americans with Disabilities Act of 1990 Provision *42 USC § 12205* A24

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 15, 2000

NO. 99-1424
CA-96-106-2

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs - Appellants,

and

ALMOST HOME, INCORPORATED; DAISY LAYMAN, by her next friend, Faye Byers

Plaintiffs

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; GRETCHEN O. LEWIS, Secretary, West Virginia Department of Health and Human Resources;

OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION; NANCY TYLER, Director, Office of Health Facility Licensure and Certification; SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL; WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia; STATE OF WEST VIRGINIA, WEST VIRGINIA STATE FIRE COMMISSION; JOHN BEATY, II, Commissioner; JOSEPH J. BOSTAR, III, Commissioner; RANDY BREEDEN, Commissioner; JAMES W. FIFE, Commissioner; FRANCIS A. GUFFEY, II, Commissioner; DANIEL HESS, Commissioner; GREGORY ALAN LAY, Commissioner; DAVID L. TOLLIVER, Commissioner; STEPHEN C. MCBEE, Commissioner; BILL L. SPENCER, Commissioner; VICTOR STALLARD, JR., Commissioner; J. D. WAGGONER, Commissioner; KENNETH MORGAN, Commissioner; JOAN E. OIL, Secretary Department of Health and Human Resources; JOHN WILKINSON, Director, Office of Health Facility Licensure and Certification; CECIL H. UNDERWOOD, Governor, State of West Virginia

Defendants - Appellees

WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES; LAURA S. RHODES, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses

Defendants

- - - - - - - - - - - - - - - - - -

On Petition for Rehearing and Rehearing En Banc

- - - - - - - - - - - - - - - - - -

Appellants' petition for rehearing and rehearing on en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Conner

Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BUCKHANNON BOARD AND CARE HOME, INCORPORATED; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

ALMOST HOME, INCORPORATED; DAISY LAYMAN, by her next friend, Faye Byers,

Plaintiffs,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; GRETCHEN O. LEWIS, Secretary, West Virginia Department of Health and Human Resources; OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION; NANCY TYLER, Director, Office of Health Facility Licensure and Certification; SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL; WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the

No. 99-1424

State of West Virginia; STATE OF WEST VIRGINIA; WEST VIRGINIA STATE FIRE COMMISSION; JOHN BEATY, II, Commissioner; JOSEPH J. BOST[illegible] Commissioner; RANDY BR[illegible]missioner; JAMES W. FIFE, Commissioner; FRANCIS A. GUFFEY, II, Commissioner; DANIEL HESS, Commissioner; GREGORY ALAN LAY, Commissioner; DAVID L. TOLLIVER, Commissioner; STEPHEN C. MCBEE, Commissioner; BILL L. SPENCER, Commissioner; VICTOR STALLARD, JR., Commissioner; J. D. WAGGONER, Commissioner; KENNETH MORGAN, Commissioner; JOAN E. OHL, Secretary, Department of Health and Human Resources; JOHN WILKENSON, Director, Office of Health Facility Licensure and Certification; CECIL H. UNDERWOOD, Governor, State of West Virginia,

Defendants-Appellees,

and

WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES; LAURA S. RHODES, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses,

Defendants.

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins.
Frederick P. Stamp, Jr., Chief District Judge.
(CA-96-106-2)

Argued: December 2, 1999

Decided: January 20, 2000

Before NIEMEYER and MOTZ, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Webster J. Arceneaux, III, LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, L.L.P., Charleston, West Virginia, for Appellants. David Paul Cleek, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia; Charlene Ann Vaughan, Deputy Attorney General, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Charleston, West Virginia, for Appellees. **ON BRIEF:** Sandra K. Henson, LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, L.L.P., Charleston, West Virginia, for Appellants. Darrell V. McGraw, Jr., Attorney General, Chad M. Cardinal, Assistant Attorney General, Charleston, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

BEST AVAILABLE COPY

OPINION

PER CURIAM:

The appellants in this case ask us to reexamine our holding in *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (*en banc*), which rejected the catalyst theory when determining whether to award attorneys fees under federal statutes making fees awardable to prevailing parties. As a three-judge panel of the court, however, we are bound by our precedent. *See Joseph v. Angelone*, 184 F.3d 320, 324-25 (4th Cir. 1999). Accordingly, we affirm the judgment of the district court that relied on *S-1 and S-2* in denying appellants' motion for attorneys fees.

Buckhannon Board and Care Home, Inc. ("Buckhannon"), which operates residential care homes for elderly people who require some assistance in the activities of daily living, failed an inspection by the West Virginia Office of the State Fire Marshal because it housed residents incapable of self-preservation, in violation of West Virginia law. *See* W. Va. Code § 16-5H-2 (1998) (requiring that all residents of residential board and care homes be capable of self-preservation). Buckhannon and other plaintiffs commenced this action for a declaratory judgment that the state law violated the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

While the action was pending, West Virginia amended state law to delete the self-preservation requirement. None of the defendants, however, informed the plaintiffs or the court of the pending amendments. Indeed, the district court noted that the defendants did not even inform their own attorney, who was representing them in this action. As a result of the amendments, this action became moot, and the district court dismissed it.

Although Buckhannon did not obtain the change in state law through an enforceable judgment, consent decree, or settlement, it claimed nevertheless that it was the prevailing party entitled to attorneys fees under the FHAA and the ADA. *See* 42 U.S.C. § 3613(c)(2); 42 U.S.C. § 12205. Buckhannon argued that under a catalyst theory, it obtained the relief it sought through the defendants' voluntary conduct because it filed this action and brought to the state's attention the flaws in its law. The district court observed that if the catalyst theory were available in this circuit, the plaintiffs "might prevail." However, because this circuit had rejected the catalyst theory in *S-1 and S-2*, the district court denied the plaintiffs' motion for attorneys fees.

On this appeal, the appellants challenge "only the district court's ruling on the disallowance of attorneys fees and costs under the 'catalyst theory.'" They urge us to reexamine our decision in *S-1 and S-2*, which, they acknowledge, would, if applied, require rejection of their appeal.

The Fourth Circuit has determined that panels of the court are bound by the prior decisions of the court, *en banc* or in panel, and that binding precedent can be reversed only by the court *en banc*. *See Joseph*, 184 F.3d at 325 ("As a panel, we are not authorized to reconsider an *en banc* holding even if we happen to be so inclined, which we are not"); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) ("[A] panel considers itself bound by the prior decision of another panel, absent an *in banc* overruling or a superseding contrary decision of the Supreme Court").

In *S-1 and S-2*, we held that in order to qualify as a "prevailing party" in litigation, the plaintiff must, through the litigation, "'obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement.'" *S-1 and S-2 v. State Board of Education of North Carolina*, 6 F.3d 160, 168 (4th Cir. 1993) (Wilkinson, J., dissenting) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)), *vacated*, 21 F.3d 49 (1994) (*en banc*) (adopting Judge Wilkinson's dissent as the majority opinion). Because the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement, we conclude that the district court properly applied *S-1 and S-2* to this case. Accordingly, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DAISY LAYMAN, by her next friend, FAYE BYERS; DORSEY PIERCE, by her next friend LOCKIE J. MARPLE, and on behalf of all others similarly situated,

Plaintiffs,

v. Civil Action No. 2:96CV106
(STAMP)

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, GRETCHEN O. LEWIS, Secretary; West Virginia Department of Health and Human Resources, OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION, NANCY TYLER, Director, Office of Health Facility Licensure and Certification SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL, WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia, STATE OF WEST VIRGINIA , WEST VIRGINIA STATE FIRE COMMISSION, JOHN BEATY, II, Commissioner, JOSEPH J. BOSTAR, III, Commissioner, RANDY

BREEDEN, Commissioner, JAMES W. FIFE, Commissioner, FRANCIS A. GUFFEY, II, Commissioner, DANIEL HESS, Commissioner, GREGORY ALAN LAY, Commissioner, DANIEL L. TOLLIVER, Commissioner, STEPHEN C. MCBEE, Commissioner, BILL L. SPENCER, Commissioner, VICTOR STALLARD, JR., Commissioner, J. D. WAGGONER, Commissioner, KENNETH MORGAN, Commissioner,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT WALTER SMITTLE'S MOTION TO DISMISS, GRANTING WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES AND CECIL UNDERWOOD'S MOTION TO DISMISS, DENYING PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND DIRECTING DEFENDANTS WALTER SMITTLE, WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL AND THE WEST VIRGINIA STATE FIRE COMMISSION TO SHOW CAUSE WHY THEY HAVE NOT VIOLATED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURES

I. Background

Plaintiffs filed this civil action in this Court on October 20, 1996, alleging, in part, violations of the Americans with Disabilities Act ("ADA") and the Fair Housing Amendments Act ("FHAA"). Plaintiffs sought declaratory and injunctive relief in addition to money damages. On January 2, 1998, plaintiffs entered a stipulation by which they relinquished all their claims for money damages, both punitive and compensatory. Consequently, plaintiffs retained claims for prospective relief only. Specifically, plaintiffs asked this Court to declare that West Virginia Code §16-5C-1, *et seq.* and 64 CSR § 65-1, *et seq.* governing residential board and care homes violate the ADA, the FHAA and the United States Constitution to the extent that the law and regulations required all RBCH residents to be capable of "self-preservation." 87 CSR § 1-14-7. In other words, the law required that all RBCH residents be able to remove themselves, physically, from "situations involving imminent danger." *Id.* On March 14, 1998, the West Virginia Legislature enacted Senate Bill 627 which amended the West Virginia Code by deleting the "self-preservation" requirement from RBCH Licensure standards.

Arguing that the amendment to the West Virginia Code mooted this civil action, defendant Walter Smittle ("Smittle") filed a motion to dismiss on May 15, 1998. Similarly, on May 22, 1998, the West Virginia Department of Health and Human Resources ("HHR") and Governor Cecil Underwood

("Underwood")[1] filed a motion to dismiss and renewed motion for summary judgment. HHR and Underwood also argued that the enactment of Senate Bill 627 mooted this civil action. On June 5, 1998, plaintiffs filed a response to both Smittle's motion to dismiss and the motion to dismiss and motion for renewed summary judgment[2] filed by HHR and Underwood. On June 15, 1998, HHR filed a reply in support of its motion to dismiss. Also on June 15, 1998, Smittle filed a reply in support of his motion to dismiss.

On June 5, 1998, plaintiffs filed a renewed motion for summary judgment. No response to this motion was filed.[3]

Also on June 5, 1998, plaintiffs filed a motion for attorney's fees. On June 18, 1998, Smittle filed a response to the motion for attorney's fees. On June 19, 1998, HHR filed a

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[1] This Court takes judicial notice that Cecil Underwood succeeded Gaston Caperton, who was the Governor of West Virginia at the time this civil action was commenced.

[2] The renewed motion for summary judgment concerned Counts IV, V and VI of the amended complaint. Those counts were dismissed by stipulation on June 11, 1998. Accordingly, this Court will not address those arguments.

[3] However, the arguments raised are addressed by the memoranda filed in conjunction with the above-noted motions to dismiss.

response to the plaintiffs' motion for attorney's fees. On June 30, 1998, plaintiffs filed a reply in support of the motion for attorney's fees.

For the reasons set forth below, this Court finds that defendant Smittle's motion to dismiss and HHR and Underwood's motion to dismiss should be granted, plaintiffs' renewed motion for summary judgment should be denied and plaintiffs' motion for attorney's fees should be denied. Additionally, this Court finds it appropriate to direct defendants Walter Smittle and the West Virginia State Fire Commission to show cause as to why they have not violated Rule 11 of the Federal Rules of Civil Procedure.

II. Discussion

A. Motions to Dismiss

As noted above, defendants HHR, Underwood and Smittle have filed motions to dismiss arguing that this civil action has been rendered moot by the West Virginia Legislature's enactment of Senate Bill 627 which eliminates the term "self-preservation" and the "self-preservation requirement" from the licensure standards for RBCHs. In response, plaintiffs contend that although the "self-preservation" language has been eliminated from the statutes governing RBCHs, this civil action is not moot because new provisions in the state fire code continue to discriminate against RBCH residents on the basis of their disability. Plaintiffs also

argue that because, like statutes, West Virginia regulations are enacted by the legislature and have like effect and because the regulations regarding "self-preservation" have not been repealed, this civil action is not moot. Additionally, plaintiffs argue that the defendant are not following the Life Safety Code adopted by the State despite the mandate in the state fire code that the Life Safety Code shall be followed. For this reason, plaintiffs contend, this civil action is not moot.

Challenges to the validity of legislation that seek only prospective relief are rendered moot if during the pendency of the litigation the legislation is repealed or amended in a significant way so that the allegedly offensive provision ceases to exist. *See e.g. United States Dept. of the Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986) (finding moot challenge to federal firearms statute after Congress amended statute to eliminate allegedly discriminatory provision); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (holding that amendment to regulation renders litigation challenging its validity moot). At the same time, because a "defendant's voluntary cessation of [a] challenged practice does not deprive a federal court of its power to determine the legality of the practice," repeal or amendment of an allegedly impermissible law may not moot a controversy if the legislation was not altered significantly, if a possibility exists that the legislature may reenact the provision, or if relief other than prospective relief was requested. *Northeastern Fla. Chapter of the Assoc. of Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993);

see City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10 (1982).

This Court finds that this civil action has been rendered moot by Senate Bill 627 which repealed the "self-preservation" requirement for RBCH residents. As noted above, plaintiffs seek only prospective relief in this civil action. Further, the elimination of the language and the requirement in its entirety is a significant alteration of the statutory scheme, and finally, this Court finds no indication of a possibility that the West Virginia Legislature will reenact a provision similar to the now repealed "self-preservation" requirement.

Plaintiffs' reliance on *Northeastern, supra*, does not compel a different result. In *Northeastern*, the City of Jacksonville repealed a set-aside ordinance after the Supreme Court granted certiorari. However, the next day, the City enacted a similar ordinance. The Court held that the action was not moot, noting that "[t]here is no mere risk that Jacksonville will repeat its allegedly wrongful conduct, it has already done so." 508 U.S. at 662. Similarly, in *Aladdin's Castle*, upon which the *Northeastern* Court relied, the Court held that a challenge to the City's licensing ordinance governing coin-operated amusement establishments was not moot despite the repeal of the ordinance. The Court found that the City could merely reenact the ordinance and noted that it had announced its intention to do so. 455 U.S. at 289 & n.11.

Here, there is no statement from the West Virginia Legislature of an intent to reenact the "self-preservation"

requirement, nor has the State reenacted a provision similar to the "self-preservation requirement." Plaintiffs argue that § 87-1-14.8.19 of the new fire code, which requires those residents who are "impractical to evacuate" to be housed on ground-level floors, constitute a reenactment, in effect, of the "self-preservation" requirement. This Court disagrees. The "self-preservation" requirement forbade RBCHs from housing any individual not capable of physically removing himself or herself to a point of safety when faced with imminent danger. The new regulation contains no such prohibition.

Further, this Court finds plaintiffs' argument with respect to the legislature's failure to repeal the regulations pertaining to "self-preservation" unpersuasive. Regulations implement a governing statute. Without such a statute, a regulation has no force or effect because there is nothing to implement. Similarly, this Court is not persuaded by plaintiffs' argument that the defendants' failure to comply with the adopted Life Safety Code prevents this controversy from being moot. The argument raises an entirely new issue in this litigation and is not related to plaintiffs' current complaint.

Because this Court finds that the repeal of the "self-preservation" requirement is a significant alteration to the statutory scheme and further finds that there is no indication that such a provision will be reenacted, this Court finds that Senate Bill 627, recently enacted by the West Virginia Legislature, renders this civil action moot. For this reason, this Court finds that the motions to dismiss made by the West

Virginia Department of Health and Human Resources and Walter Smittle should be and hereby are GRANTED.

B. Renewed Motion for Summary Judgment

Because this Court has found that this civil action is moot, plaintiffs' renewed motion for summary judgment should be and hereby is DENIED.

C. Motion for Attorney's Fees

Plaintiffs make two arguments in support of their motion for attorney's fees: (1) plaintiffs are prevailing parties entitled to an award of such fees or (2) the bad faith doctrine entitles plaintiffs to such fees. First, plaintiffs argue that under the "catalyst theory," they are prevailing parties and are entitled to attorney's fees pursuant to provisions in the ADA and the FHAA. The "catalyst theory" deems a plaintiff to have prevailed when he or she obtains some portion of the relief originally sought through a defendant's voluntary conduct, even though no formal judgment in his or her favor has been rendered. Were this argument viable, plaintiffs might prevail on this theory. However, the United States Court of Appeals for the Fourth Circuit has rejected the "catalyst theory." *S-1 and S-2 v. State Board of Educ. of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994). Plaintiffs argue that this Court should not follow this holding. Instead, plaintiffs assert, this Court should follow Third Circuit precedent, which permits parties to avail

themselves of the "catalyst theory." This Court finds that such action would be wholly improper.

Second, plaintiffs argue that this Court should invoke its inherent power to award attorney's fees premised upon defendant Smittle and the Fire Commission's alleged bad faith. Plaintiffs note that approximately six weeks after they took defendant Smittle's deposition in this matter, during which he defended the "self-preservation" requirement as a valid exercise of the State's policy power, Smittle took action to get the Fire Code amended and proposed changes that would eliminate the "self-preservation" requirement. Furthermore, plaintiffs assert, these defendants saw the proposed amendments through their adoption and promulgation by the West Virginia Legislature in House Bill 4200. At no time did they inform plaintiffs, this Court, or even their own attorney that these changes were being sought and were successfully progressing through the adoption process. Plaintiffs contend that had they so informed them, or even their own attorney, this civil action could have been stayed, saving plaintiffs, this Court and the defendants' attorney a significant amount of time and expense. Particularly, plaintiffs point out that the parties were briefing cross-motions for summary judgment at the same time that the amendments eliminating the "self-preservation" requirement had been approved by the Legislative Rule Making Committee and that the intention to introduce them into the legislature had been announced at the Fire Commission meeting. The cross-motions were quite lengthy and quite complex. Indeed, this Court found

it necessary to grant plaintiffs an extension of the twenty-page limit for memoranda imposed by this Court's local rules.

In response, defendant Smittle argues that plaintiffs should have known about the proposed amendments to the Fire Code because public notice of the meetings at which they were to be discussed was given. Additionally, defendant Smittle avers that he "never considered their actions as part of the pending litigation . . . ." (Resp. to Mot. for Attys Fees at 5).

Under the general American rule, each party bears his or her own attorney's fees. However, the Court may invoke its inherent power to assess attorney's fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991). Although plaintiffs make a very strong argument for an award of attorney's fees under this exception to the general rule, this Court finds that defendants Smittle and the Fire Commission's failure to inform this Court, plaintiffs or their own counsel of the proposed amendment to the Fire Code and the successful progression of those proposed amendments does not quite rise, or sink, to that level of conduct that is sanctioned pursuant to this exception. For this reason, this Court finds that plaintiffs' motion for attorney's fees should be and hereby is DENIED.

D. Order to Show Cause

Rule 11 of the Federal Rules of Civil Procedure provides that a court may, upon its own motion, order an

attorney or a party to show cause as to why his or her behavior in the process of litigation has not violated Rule 11. Fed. R.Civ. P. 11(c)(1)(B). This Court finds that defendants Walter Smittle, the West Virginia Office of the State Fire Marshal, and the West Virginia State Fire Commission's failure to notify plaintiffs and this Court of the proposed amendments and their successful progression through the adoption process may constitute conduct that warrants sanctions under Rule 11. Such notification may have saved plaintiffs' counsel, and even defendants' counsel, the significant amount of time and expense that was accorded to preparing and filing the cross-motions for summary judgment.

Accordingly, this Court hereby DIRECTS defendants Walter Smittle, the West Virginia Office of the State Fire Marshal, and the West Virginia State Fire Commission to submit a memorandum to this Court on or before **February 16, 1999** as an effort to show cause why they have not violated Rule 11. Plaintiffs shall file a response, pursuant to Rule 11, if any, no later than **February 23, 1999**.

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this order to counsel of record herein.

ENTERED: January 29, 1999

s/ Frederick P. Stamp, Jr.

FREDERICK P. STAMP, JR.
UNTIED STATES DISTRICT JUDGE

42 USC § 3613

§ 3613. Enforcement by private persons

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis

for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

(b) Appointment of attorney by court

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may -

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the

plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals

Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

(e) Intervention by Attorney General

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section

3614(e) of this title in a civil action to which such section applies.

42 USC § 12205

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.